

PUBLIC VERSION

**UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, DC 20436**

In the Matter of

**CERTAIN WIRELESS CONSUMER
ELECTRONICS DEVICES AND
COMPONENTS THEREOF**

Investigation No. 337-TA-853

RESPONDENTS' JOINT STATEMENT ON THE PUBLIC INTEREST

Pursuant to the Commission's Notice of Request for Statements on the Public Interest and 19 C.F.R. § 210.50(a)(4), Respondents¹ respectfully submit this statement. At the outset, Respondents note that no limited exclusion order or cease and desist orders should issue in this Investigation because the Initial Determination correctly found that none of the Respondents have violated Section 337, relying on three separate and independent bases of noninfringement. Further, the ALJ recommended against issuance of cease and desist orders.

If the Commission were to reverse the Initial Determination and find a violation of Section 337, the facts of this Investigation would nevertheless demonstrate that a limited exclusion order and/or cease and desist orders would be contrary to the public interest. In particular, any remedial order issued in this Investigation would be directed to a substantial percentage of the U.S. markets for, among other products, smartphones and personal navigation devices, and therefore would negatively affect U.S. consumers in the form of higher prices and

¹ "Respondents" refers collectively to Barnes & Noble, Inc.; Garmin Ltd., Garmin International, Inc. and Garmin USA, Inc.; HTC Corporation & HTC America, Inc.; Huawei Technologies Co., Ltd., Huawei Device Co., Ltd., Huawei Device USA Inc., and Futurewei Technologies, Inc.; LG Electronics, Inc. and LG Electronics U.S.A., Inc.; Nintendo Co., Ltd., and Nintendo of America Inc.; Novatel Wireless, Inc.; Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc. and ZTE Corporation and ZTE (USA) Inc.

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more limited choices in terms of features and functionality. Any remedial order also would negatively affect the competitive conditions in the U.S. economy, and would reward patent assertion entities whose sole business is to extract revenues from existing electronics producers.

A. A remedial order would have deleterious effects on United States consumers

A remedial order in this Investigation would deprive U.S. consumers of Respondents' goods and services, in exchange for nothing except the possibility of fewer products to choose from at higher prices. Tr. (Vander Veen) at 1844:8-18. Respondents account for a significant share of the sales of several products at issue in this Investigation, including []% of the sales of smartphones in the United States and between []% of the mobile navigation devices market []. RX-1636; RX-1637; RX-936C; RX-2188C; Tr. (Vander Veen) at 1840:11-25; 1846:6-22, 1848:24-1849:8; 1866:10-1867:21. Should an exclusion order issue, there would be a substantial reduction in supply in the U.S. market for products such as smartphones and personal navigation devices, thus resulting in less choice for consumers due to fewer market participants selling products and ultimately leading to higher prices for those goods. *Id.* When such a large stake of a product market is at issue, the Commission has previously found that an exclusion order may raise concerns regarding competitive conditions in the U.S. economy. *See Certain Personal Data and Mobile Commc 'ns Devices*, Inv. No. 337-TA-710, Comm'n Op. at 79-83 (Dec. 29, 2011) (delaying the exclusion of accused products by four months after considering the competitive conditions in the U.S. economy).

While Complainants² may suggest that their licensees can replace the subject articles if Respondents' goods are excluded, Complainants have failed to demonstrate that their licensees have the capacity to do so. For example, even if Complainants identified any licensee in the

² "Complainants" refers collectively to Technology Properties Limited LLC ("TPL"), Phoenix Digital Solutions LLC ("PDS") and Patriot Scientific Corporation ("Patriot").

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mobile phone business with a viable alternative supply chain, there is still no evidence that these licensees' products are interchangeable, or that they have the infrastructure or the capacity to fill the void left by a reduction of nearly []% of the U.S. market's smartphones. Even if there were any group of licensees that make up a significant portion of a relevant market, a remedial order would still result in reduced consumer choice and competition. Tr. (Vander Veen) at 1846:6-22.

Complainants have also failed to show that their licensees can increase production within a commercially reasonable time to account for even a portion of the increased demand that would result from an exclusion order. Accordingly, U.S. consumers could experience a shortage of replacement devices and/or a delay in obtaining such devices. Nor have Complainants provided evidence that their licensees' products are comparable to the products that would be subject to an exclusion order. As a result, U.S. consumers might be unable to obtain products with the features or functionality they want.

U.S. consumers could also be harmed by Respondents' inability to carry out their obligations under existing warranty and insurance contracts if an exclusion order issues without a repair exception. Tr. (Vander Veen) at 1844:8-1846:5.

B. A remedial order would have deleterious effects on competitive conditions in the United States economy

The issuance of remedial orders would also harm the competitive conditions in the U.S. economy. Orders blocking Respondents from the marketplace would remove the majority of key players from a number of consumer electronics sectors. As discussed above, Respondents hold significant market shares in several industries, including the mobile phone and personal navigation device markets. Tr. (Vander Veen) at 1861:22-1864:5. Fewer market participants would result in higher prices, reduced market access, less choice, and decreased incentives to

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innovate, thus harming competitive conditions in the U.S. economy. *Id.* at 1846:6-22.

A remedial order would also likely adversely affect the competitive conditions for the relevant categories of products by providing Complainants significant asymmetric bargaining power over Respondents in licensing negotiations. As a result, competitive conditions in the U.S. economy for these various product categories would be adversely affected through constrained supply, reduced consumer choice, reduced numbers of market participants, and increased prices.

C. A remedial order would increase the asymmetric bargaining advantage of patent assertion entities

Complainants are patent assertion entities. They conduct no research, make no products and sell no services. Indeed, none of the Complainants manufactures, designs, or sells any products in the United States, let alone products that directly compete with the accused products. Tr. (Hannah) at 1739:12-1740:9; Tr. (D.E. Leckrone) at 134:12-25; 139:15-18.

They purchased the asserted patent solely to assert that patent against established industry participants. They do not encourage the adoption of technology. Instead, their business model focuses on extracting payments from companies that contribute valuable products and services to U.S. consumers.

Although there is a legitimate interest in protecting intellectual property rights, that interest simply does not extend to granting patent assertion entities like these Complainants the right to gain undue leverage by obtaining an exclusion order at the Commission. It is not in the public interest to issue an exclusion order when monetary damages would clearly be adequate compensation to Complainants like those in this Investigation. This fact is apparent from Complainants' own business model, which seeks solely to monetize patents. In fact, exclusion is contrary to Complainants' financial interests, as well, except for the would-be "hold-up" value it

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provides. Complainants have no products, let alone domestically manufactured products, to protect with an exclusion order. Because Complainants make no products, they have no product sales at risk when negotiating licenses to their intellectual property. If an exclusion order were to issue, Complainants could use that order to demand overly favorable licensing terms—thereby permitting Complainants to artificially and wrongfully inflate the value of their patents.

Issuance of an exclusion order in this Investigation would also run contrary to the interests and industries the statute was designed to protect. The legislative history of Section 337 shows that it was designed to protect companies that are exploiting the asserted patent through manufacturing or through licensing directed to bringing products to market. *See* S. Rep. No. 100-71, at 129 (1987); H.R. Rep. No. 100-40, at 157 (1987); *Certain Coaxial Cable Connectors and Components Thereof and Products Containing Same*, Inv. No. 337-TA-650, Comm’n Op. at 47 (Apr. 14, 2010). Complainants’ primary business involves seeking out potential licensees who manufacture and sell products that are already in the marketplace. This is not the type of activity that Section 337’s legislative history contemplates. This fact provides additional support for why it would not be in the public interest to issue remedial orders in this Investigation.

D. Conclusion

For all of these reasons, a limited exclusion order or cease and desist orders in this Investigation would be contrary to the public interest. The harm to U.S. consumers and competitive conditions in the U.S. economy that would result from the issuance of remedial orders directed to such substantial portions of the U.S. market outweighs the interest in protecting Complainants’ intellectual property rights—especially because, as patent assertion entities whose business model does nothing to encourage innovation, Complainants can be made whole through an award of monetary damages.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Hyun Jung, hereby certify that on this 4th day of November, 2013, copies of the foregoing document were served upon the following parties as indicated:

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Certain Wireless Consumer Electronics Devices and Components Thereof
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